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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D Noland, Jr., et al.,

13 Defendants.
14

No. CV-20-00047-PHX-DWL

ORDER

15 On February 18, 2021, hundreds of Proposed Intervenor filed a motion to intervene
16 in this action. (Doc. 274.) On April 2, 2021, after the motion had been fully briefed, the
17 Court denied the motion to intervene as untimely (the “April Order”) (Doc. 313).

18 On June 1, 2021, the Proposed Intervenor, now numbering “nearly 1,000” persons,
19 filed a “renewed Rule 24 motion to intervene” (the “Renewed Motion”). (Doc. 358.) The
20 Renewed Motion is fully briefed and neither side has requested oral argument. (Docs. 359,
21 361.) For the following reasons, the Renewed Motion is denied.

22 **BACKGROUND**

23 **I. Overview Of Parties, Claims, And Proposed Parties**

24 This case concerns the business activities of Success By Health (“SBH”), which is
25 “an affiliate-marketing program that sells coffee products and other nutraceuticals through
26 its online platform and network of affiliates.” (Doc. 106 at 1-2.) Plaintiff Federal Trade
27 Commission (the “FTC”) asserts, among other things, that SBH is an illegal pyramid
28 scheme and that James Noland, Lina Noland, Thomas Sacca, and Scott Harris (together,

1 the “Individual Defendants”) have made false statements to SBH’s affiliates. (Doc. 3.)

2 The Proposed Intervenor’s are SBH affiliates. (Doc. 274 at 1, 16-23 ¶¶ 1-101; Doc.
3 312.) As discussed in the April Order, a great deal of litigation activity has already
4 occurred in this case, much of it with the benefit of input from SBH affiliates, including
5 some of the Proposed Intervenor’s.

6 **II. Relevant Procedural History**

7 **A. Procedural History Before The April Order**

8 The Court incorporates by reference the extensive litigation history of this case set
9 out in the April Order, including the many ways in which many SBH affiliates who are
10 among the Proposed Intervenor’s have participated. (Doc. 313 at 2-5.)

11 **B. The (Dismissed) Appeal Of The April Order**

12 On April 19, 2021, the Proposed Intervenor’s filed a notice of appeal of the April
13 Order. (Doc. 318).

14 The Renewed Motion was filed on June 1, 2021, while the Ninth Circuit appeal was
15 still pending. (Doc. 358.)

16 After the FTC argued in response to the Renewed Motion that the Court lacked
17 jurisdiction to decide it while the original motion was on appeal (Doc. 359 at 1-3), the
18 Proposed Intervenor’s moved to voluntarily dismiss their appeal (Doc. 361 at 6-7.)

19 On July 23, 2021, the Ninth Circuit dismissed the appeal. *FTC v. Noland*, 21-15767
20 (9th Cir. July 1, 2021), Docs. 9, 10.

21 On July 26, 2021, the Ninth Circuit’s dismissal order was served on this Court,
22 which acted as the mandate. (Doc. 378.) The Court accordingly now possesses jurisdiction
23 to resolve the Renewed Motion.

24 **C. Other Relevant Procedural History Since the April Order**

25 This case has continued to demand the active attention of the parties and the Court
26 since the issuance of the April Order. The Court need not recount in detail the many
27 motions the parties have filed and briefed, and the Court has resolved, since April 2, 2021.
28 But the Court notes that between April 2, 2021 and June 1, 2021, when the Renewed

1 Motion was filed, 44 entries were filed on the docket, including some that involved
2 discovery against two SBH affiliates who are among the Proposed Intervenors. (Docs.
3 314-57.)¹

4 Additionally, the parties have extensively litigated the effect of the Supreme Court's
5 April 22, 2021 decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021).
6 Specifically, on the same day that *AMG Capital* was decided, the Court ordered the parties
7 to meet and confer about the issues raised by *AMG Capital* and then submit a joint
8 memorandum summarizing the parties' positions on those issues. (Doc. 325.)

9 On April 29, 2021, the parties filed their joint memorandum. (Doc. 330.)

10 On May 3, 2021, the Court held a telephonic status conference. (Doc. 334, 342.)
11 Based on the joint memorandum and the parties' arguments during the status conference,
12 the Court ordered the Individual Defendants to file any motion to dissolve or modify the
13 preliminary injunction and receivership that are in effect in this case by May 21, 2021.
14 (Doc. 334.)

15 On May 21, 2021, the Individual Defendants filed a "memorandum" on the "Effect
16 of *AMG Capital Management* on this Case." (Doc. 352.) On May 28, 2021, the FTC filed
17 a response to the memorandum. (Doc. 355.) On June 1, 2021, the Individual Defendants
18 filed a reply. (Doc. 357.)

19 One June 15, 2021, the Court issued an order regarding the Individual Defendants'
20 memorandum. (Doc. 362.) In the order, the Court noted its openness to revising the asset
21 freeze and receivership provisions of the preliminary injunction in light of *AMG Capital*.
22 (*Id.* at 1-2.) The Court observed, however, that the Individual Defendants filed a
23 memorandum rather than a motion, so there was "no proper request for judicial relief
24 pending before the Court" and accordingly declined to take any action at that time. (*Id.* at
25 2-3.) The Court also concluded that even if the Individual Defendants had filed a motion,

26 ¹ The two Proposed Intervenors in question are Jeffrey and Amber Wright. (Docs.
27 322, 358-1 at 23.) The FTC moved to compel the Wrights to produce documents pursuant
28 to a Rule 45 subpoena, which resulted in full briefing of that motion as well as a motion
for a protective order filed by the Individual Defendants. (Docs. 322, 326, 344-45, 349-
50.) The Court resolved these motions in a May 28, 2021 order. (Doc. 356.)

the Court did not have jurisdiction to dissolve or modify the asset freeze and receivership because the Individual Defendants had a pending appeal before the Ninth Circuit challenging the Court’s October 27, 2020 order denying the Individual Defendants’ motion to dissolve or modify the preliminary injunction. (*Id.* at 3-4.) The Court finally noted that, in a series of recent decisions, the Ninth Circuit did not seem to interpret *AMG Capital* in the expansive manner urged by the Individual Defendants. (*Id.* at 4.)

On July 28, 2021, the Ninth Circuit issued a memorandum disposition affirming the Court’s denial of the Individual Defendants’ motion to dissolve or modify the preliminary injunction. *FTC v. Noland*, 20-17324 (9th Cir. July 28, 2021), Doc. 60-1. The panel stated: “We leave it to the district court in the first instance to consider whether and to what extent the *decision* in *AMG Capital Management* . . . bears on the preliminary injunction.” *Id.* at 3.

DISCUSSION

I. Legal Standard

“Rule 24 recognizes two types of intervention: (1) intervention of right; and (2) permissive intervention. Courts must permit intervention of right, but may permit or deny permissive intervention.” 1 Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 24, at 716 (2021). As in their original motion, the Proposed Intervenors in the Renewed Motion seek to intervene under both theories.

Intervention of right is available to anyone who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). Courts in the Ninth Circuit employ a four-part test when analyzing intervention of right:

- (1) the motion must be timely; (2) the applicant must claim a “significantly protectable” interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the parties to the action.

1 *Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *Sierra*
 2 *Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993)). These requirements are broadly
 3 construed because “a liberal policy in favor of intervention serves both efficient resolution
 4 of issues and broadened access to the courts.” *Id.* (citation omitted). That said, “[f]ailure
 5 to satisfy any one of the requirements is fatal to the application,” and the Court “need not
 6 reach the remaining elements if one of the elements is not satisfied.” *Perry v. Proposition*
 7 *8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). Permissive intervention, on the
 8 other hand, is available “on timely motion” to “anyone . . . who . . . has a claim or defense
 9 that shares with the main action a common question of law or fact.” Fed. R. Civ. P.
 10 24(b)(1)(B). “[A] court may grant permissive intervention where the applicant for
 11 intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and
 12 (3) the applicant’s claim or defense, and the main action, have a question of law or a
 13 question of fact in common.” *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th
 14 Cir. 2002) (citation omitted). “The district court is given broad discretion to make this
 15 determination.” *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011).

16 II. Analysis

17 A. **Parties’ Arguments**

18 The Proposed Intervenor argues that “the factual and legal circumstances of this
 19 case have shifted markedly, necessitating that the Court now grant Proposed Intervenor’s
 20 motion.” (Doc. 358 at 1-2.) Factually, they argue, circumstances have changed because
 21 instead of there being 710 Proposed Intervenor, there are now “nearly 1,000.” (*Id.* at 2.)
 22 Legally, they argue, *AMG Capital* has “laid bare” the unlawful nature of this FTC
 23 enforcement action, which means that the Proposed Intervenor should now have the
 24 opportunity to intervene. (*Id.*) As for timeliness, they argue that the “totality of the
 25 circumstances” inquiry weighs in their favor now, several months after their original
 26 motion was ruled untimely, because *AMG Capital* has shown that this action is unlawful,
 27 so “it is not only appropriate, but necessary” that intervention be permitted. (*Id.* at 11-12.)
 28 As for the remaining intervention factors, the Proposed Intervenor largely rehash—at

1 times verbatim—the arguments from their original motion. (*Id.* at 12-16 & n.3.)

2 The FTC responds, in relevant part, that the Renewed Motion should be treated as
3 a motion for reconsideration, and, because the Renewed Motion fails to comply with the
4 rules applicable to motions for reconsideration, it should be denied. (Doc. 359 at 3-5.) The
5 FTC argues in the alternative that the Renewed Motion should be denied on the merits.
6 (*Id.* at 5-6.)

7 The Proposed Intervenors reply that the Renewed Motion “is not, as the FTC
8 contends, a motion for reconsideration of the Court’s prior ruling.” (Doc. 361 at 2.) They
9 also reassert that *AMG Capital* renders the Renewed Motion timely, because *AMG Capital*
10 “requires a careful reexamination of the legitimacy of this action.” (*Id.* at 3.) They argue
11 that although they seek the same outcome as the Individual Defendants, they “are
12 independently interested in continuing their own thriving businesses, which have been
13 considerably harmed by the FTC’s action in this matter.” (*Id.* at 3-4.) They contend they
14 “offer a uniquely valuable and credible perspective on the allegations against the
15 defendants.” (*Id.* at 4.)²

16 B. Merits

17 The Proposed Intervenors avow that they are not seeking reconsideration of the
18 April Order, which denied their earlier intervention request on untimeliness grounds.
19 Instead, their theory seems to be that they are bringing a standalone intervention motion
20 predicated on the impact of *AMG Capital* and the swelling of their ranks to nearly 1,000
21 persons. The Renewed Motion is denied on the merits.³

22 ² The Proposed Intervenors also contend they have standing to intervene in this
23 action. (Doc. 358 at 10-11; Doc. 361 at 1.) The FTC does not argue otherwise. (Doc.
24 359.) As noted in the April Order, in some FTC enforcement actions, nonparties who have
25 suffered financial harm as a result of the action have been found to have Article III standing
to intervene. *FTC v. Nudge, LLC*, 2020 WL 6881846, *3 (D. Utah 2020) (“The injury they
claim is the loss of monthly payments due to them . . . since the entry of the of the injunction
in this case. This injury is neither speculative nor hypothetical . . .”).

26 ³ Were the Court to construe the Renewed Motion as a motion for reconsideration, it
27 would be denied under LRCiv 7.2(g) because it repeats many of the written arguments the
28 Proposed Intervenors made in their original motion. LRCiv 7.2(g)(1). Further, the
Renewed Motion was filed 60 days after the April Order was issued and 39 days after the
Supreme Court’s *AMG Capital* decision was issued, rendering it untimely. LRCiv
7.2(g)(2).

1 1. Timeliness

2 As noted in the April Order, when determining the timeliness of a motion to
3 intervene, courts consider “three factors: (1) the stage of the proceeding at which an
4 applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and
5 length of the delay.” *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302
6 (9th Cir. 1997) (internal quotation marks omitted). “[T]he crucial date for assessing the
7 timeliness of a motion to intervene is when proposed intervenors should have been aware
8 that their interests would not be adequately protected by the existing parties.” *Smith v. L.A.*
9 *Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). The same three timeliness factors
10 apply to requests for intervention as of right and permissive intervention. *Wilson*, 131 F.3d
11 at 1308. “In the context of permissive intervention, however, [courts] analyze the
12 timeliness element more strictly than . . . with intervention as of right.” *Id.* “[A]ny
13 substantial lapse of time weighs heavily against intervention.” *Id.* at 1302 (internal
14 quotation marks omitted).

15 The April Order explained at length why the Proposed Intervenors’ original motion
16 was untimely. (Doc. 313 at 6-12.) Unsurprisingly, the same factors that weighed against
17 a finding of timeliness four months ago weigh against a finding of timeliness now, and the
18 Court adopts the reasoning of the April Order for purposes of resolving the Renewed
19 Motion.

20 The Court also notes that the FTC has now filed not one but two pending motions
21 for summary judgment, one of which is already fully briefed. (Docs. 285, 335, 370, 365.)
22 There is also a pending motion for preliminary injunction wherein the FTC seeks an asset
23 freeze and receivership to preserve funds for a monetary judgment under Section 19 of the
24 FTC Act. (Docs. 351, 360, 363.) Thus, this proceeding is at an even more advanced stage
25 and sensitive time than it was before, and the first and second timeliness factors weigh even
26 more strongly against the Proposed Intervenors now.

27 As for the remaining timeliness factor, the reason for and length of the delay, the
28 Proposed Intervenors seem to suggest that the delay in this instance is justified because the

1 decision in *AMG Capital* has shifted the legal landscape. Indeed, *AMG Capital*, and the
2 addition of close to 300 additional Proposed Intervenor, are the two bases for the Proposed
3 Intervenor's assertion that the Renewed Motion should be granted. The Court disagrees
4 on both counts.

5 First, the Proposed Intervenor fails to demonstrate that *AMG Capital* in any way
6 alters the timeliness analysis. As discussed in the April Order, the Proposed Intervenor
7 became aware as early as January 2020 (and by no later than September 2020) that their
8 protected interests were being affected by this litigation and that the existing parties were
9 purportedly not protecting those interests. (Doc. 313 at 10.) Although the Proposed
10 Intervenor may view *AMG Capital* as providing additional support for the arguments
11 they wish to advance, they have been aware of those arguments for a very long time.
12 Tellingly, the proposed complaint the Proposed Intervenor attached to the Renewed
13 Motion (Doc. 358-2) appears to be identical in substance (except for the addition of the
14 new Proposed Intervenor) to the proposed complaint they attached to the original motion
15 (Doc. 274 at 15-32). This underscores that *AMG Capital* did not somehow result in the
16 Proposed Intervenor discovering the existence of protected interests of which they were
17 previously unaware. And as the Ninth Circuit has emphasized, "[t]he crucial date for
18 assessing the timeliness of a motion to intervene is when proposed intervenors should have
19 been aware that their interests would not be adequately protected by the existing parties."
20 *Smith*, 830 F.3d at 854. "A party must intervene when he knows or has reason to know
21 that his interests might be adversely affected by the outcome of litigation." *United States*
22 *v. Alisal Water Corp.*, 370 F.3d 915, 923 (9th Cir. 2004). Accordingly, the reason-for-and-
23 length-of-delay factor still weighs strongly against a finding of timeliness.

24 Second, the Court is unpersuaded that the growth of the Proposed Intervenor's
25 purported class from 710 to "nearly 1,000" persons has any effect on the timeliness analysis
26 of Rule 24. As with their *AMG Capital*-based arguments, the Proposed Intervenor's
27 argument that their greater numbers weigh in favor of intervention is unsupported by legal
28 authority or proper analysis of factors relevant to the Rule 24 timeliness inquiry.

1 The balance of the timeliness factors continues to weigh strongly against a finding
2 of timeliness.

3 2. Other Considerations

4 In the April Order, the Court raised a number of considerations in addition to
5 timeliness that weighed against granting intervention, including that (1) the Proposed
6 Intervenor's request to intervene in an FTC enforcement action while proceeding as a
7 putative class is highly unusual and perhaps unprecedented; (2) courts generally deny
8 requests by nonparties to intervene in FTC enforcement actions because there is a
9 presumption that the FTC, as a government litigant, adequately protects its constituents'
10 interests—a presumption that can be overcome based on exceptions that are inapplicable here;
11 and (3) a proposed intervenor generally cannot intervene simply on the basis that the action
12 is resulting in disruption of his or her business. (Doc. 313 at 12-14.)

13 The Renewed Motion fails to address the first and third points. The Proposed
14 Intervenor does add a new paragraph arguing that the FTC should not enjoy the presumption
15 of adequately protecting its constituents' interests because this action "is both unsupported
16 by the plain language of the FTC Act and had the intent and effect of avoiding the
17 procedural safeguards and rulemaking process contemplated by Sections 5 and 19 of the
18 law." (Doc. 358 at 14.) But this argument ignores the legal authority in the April Order
19 suggesting that intervention in FTC enforcement actions appears generally to be limited to
20 instances where the proposed intervenor wants to challenge the disposition of a single asset.
21 *See, e.g., FTC v. Nudge, LLC*, 2020 WL 6881846, *3 (D. Utah 2020) (intervention granted
22 so married couple could pursue the claim that restrained company should be allowed to
23 continue making payments to them pursuant to a settlement agreement executed before the
24 enforcement action arose); *FTC v. Loss Mitigation Servs. Inc.*, 2009 WL 10673186, *2
25 (C.D. Cal. 2009) (intervention granted so entity could pursue the claim that it was the true
26 owner of a bank account containing just over \$175,000 that the court-appointed receiver
27 "wrongly took possession of"). As the April Order noted, such circumstances are a far cry
28 from engrafting a 1,000-member class action onto an FTC enforcement action after

1 discovery has already closed (and one summary judgment motion has already become fully
2 briefed) in order to challenge, among other things, the propriety of the FTC's decision to
3 pursue the enforcement action in the first instance. (Doc. 313 at 12-13.)

4 Further, even if the Proposed Intervenor believe the FTC is not adequately
5 representing their interests, they have conceded that "the Proposed Intervenor and the
6 defendants are seeking the same outcome to this litigation." (Doc. 361 at 3.) Thus,
7 although the Proposed Intervenor may be "independently interested in continuing" their
8 SBH businesses and offering their "uniquely valuable and credible perspective on the
9 allegations against the defendants," the Proposed Intervenor have failed to show that their
10 interests are not adequately protected by the Individual Defendants who, as conceded, seek
11 the same outcome in this case and are actively seeking to dismiss the action and/or dissolve
12 the permanent injunction. (*See, e.g.*, Doc. 383 [motion to dissolve the preliminary
13 injunction order and motion to stay or dismiss § 13(b) proceedings filed on July 30, 2021].)

14 The Court acknowledges that the Proposed Intervenor have strongly held and
15 passionate views about the FTC's allegations and other aspects of this case. As noted in
16 the April Order, the Court has been made aware of these views through the many
17 declarations submitted by some of the Proposed Intervenor. The outcome of this order
18 should not be taken as a signal that the Court is unmindful or dismissive of the Proposed
19 Intervenor's concerns. Instead, the Court's conclusion reflects its duty to follow the law,
20 which clearly compels the denial of this unusual and untimely intervention motion.

21 Accordingly,

22 **IT IS ORDERED** that the Proposed Intervenor's renewed Rule 24 motion to
23 intervene (Doc. 358) is **denied**.

24 Dated this 2nd day of August, 2021.

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26 
27 _____
28 Dominic W. Lanza
United States District Judge